No. 83-730

# In the Supreme Court of the United States

OCTOBER TERM, 1983

WATER TRANSPORT ASSOCIATION, PETITIONER

*v.*

INTERSTATE COMMERCE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the Interstate Commerce Commission properly determined that beneficial ownership by a railroad of a water carrier's stock, held temporarily in an irrevocable independent voting trust pending review by the Commission, does not violate the prohibition of 49 U.S.C. (Supp. V) 11321.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 715 F.2d 581. The decision of the Interstate Commerce Commission (Pet. App. 51a-67a) is not reported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 68a-70a) was entered on August 4, 1983. A petition for rehearing was denied on August 6, 1983 (Pet. App. 71a-73a). A petition for reconsideration of the order denying rehearing was denied on October 28,

1983 (Pet. App. 74a). The petition for a writ of certiorari was filed on November 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Under 49 U.S.C. (Supp. V) 11321, a railroad may not "own, operate, control, or have an interest in" a competing water carrier unless the Interstate Commerce Commission has approved the transaction after a hearing. CSX Corporation (which owns several railroads) seeks to acquire control of Texas Gas Resources Corp. (Texas Gas), which owns American Commercial Barge Lines, Inc., a water carrier. Water carrier operations represent about ten percent of the revenues of Texas Gas, whose primary business is operating a natural gas pipeline.

In June 1983, Texas Gas, a public corporation, became the object of a hostile tender offer. Texas Gas sought out CSX and CSX agreed to make a tender offer for 100% of Texas Gas stock at a higher price than the hostile offer.

Texas Gas and CSX recognized that the resulting acquisition of a water carrier by CSX would require approval under 49 U.S.C. (Supp. V) 11343 (requiring Commission approval before one carrier may acquire another), and might also require Commission approval under the Panama Canal Act, as amended and codified in 49 U.S.C. (Supp. V) 11321. Pending a hearing and decision on such approval, CSX agreed to place the water carrier stock in an independent voting trust pursuant to Commission voting trust guidelines (Pet. App. 91a-102a). See 49 C.F.R. Pt. 1013. The voting trust is irrevocable and instructs the trustee, Midlantic National Bank, not to "create any dependence or intercorporate relationship" between CSX and the water carrier, nor to vote

the trust to elect any representative of CSX or Texas Gas or their affiliates as an officer or director of the water carrier (Pet. App. 92a-93a).

The voting trust agreement was submitted to the Commission for its review prior to any purchase by CSX. In its letter of transmittal, CSX committed itself to file an application for Commission approval of the water carrier acquisition "as soon as practicable" (see Pet. App. 7a) (footnote omitted). The Commission staff suggested changes in the voting trust, which CSX and Texas Gas adopted. The Commission staff then issued an "informal nonbinding * * * opinion" that the trust "does effectively insulate * * * CSX from violation of the Commission's policy against an unauthorized acquisition of control of a regulated carrier" (*id.* at 106a-107a).

2. On June 23, 1983, petitioner Water Transport Association (WTA) petitioned the Commission for a declaration that a voting trust does not satisfy the requirement of Section 11321 that a rail carrier not hold an "interest" in a water carrier without Commission approval. WTA also asked the Commission to enjoin the CSX-Texas Gas merger and to stay CSX's acquisition of Texas Gas stock.

The Commission issued a decision denying WTA's requests on June 29, 1983 (Pet. App. 51a-67a). The Commission found that the voting trust arrangement was consistent with the purpose of Section 11321—"to prohibit [rail-water] relationships with possible adverse impacts on competition" (Pet. App. 62a)—because the voting trust reasonably insulates the water carrier from railroad control, preventing significant harm to water competition during the limited period necessary to permit formal Commission review of the transaction. As the Commission stated (*id.* at 66a):

> [A]n independent voting trust of the type entered into here is merely a temporary device designed to avoid a technical violation of the law in the context of a corporate acquisition. It is not, and cannot, be a device for holding stock on a permanent basis. This fact alone largely prevents the voting trust device from becoming a tool for altering rail-water competitive relationships.

The Commission observed that Section 11321 "does not prohibit railroad control of connecting water carriers," but instead "addresses railroad interests in directly competing water carriers" (Pet. App. 66a). The Commission pointed out that it could act in the event that CSX took any steps to reduce competition despite the existence of the trust (*id.* at 63a-64a). Thus, the Commission held that a temporary independent voting trust, designed to insulate a water carrier from control by a rail carrier pending a Commission decision on the lawfulness of the merger, is not prohibited by Section 11321.

3. a. WTA sought and obtained a federal district court order temporarily restraining CSX from purchasing Texas Gas shares; this order was continued by the court of appeals pending its review of the Commission's decision. Expedited briefing and argument followed.

b. On August 4, 1983, the court of appeals affirmed the Commission's decision, with District Judge Greene dissenting (Pet. App. 1a-50a). The majority summed up its limited holding as follows (*id.* at 10a n.10) (emphasis in original):

> We uphold the voting trust only as an *interim* device to permit the ICC to hold a hearing and decide whether the two carriers compete and, if so, whether a permanent relationship between the

two carriers is in the public interest and will not reduce competition.

In reaching this conclusion, the court reviewed the legislative history of Section 11321 and Commission precedent, both of which, it found, supported the Commission's decision (Pet. App. 13a-23a). The court first traced the evolution of Section 11321 from the original Panama Canal Act of 1912, ch. 390, 37 Stat. 560 *et seq.*, which was enacted out of congressional concern about the then-current predatory behavior of railroads dominating a much weaker water carrier system. In the Act, Congress prohibited a railroad from controlling or even "hav[ing] any interest whatsoever * * * in any common carrier by water * * * with which said railroad * * * does or may compete * * *" (Pet. App. 13a) (quoting Section 11 of the Panama Canal Act, 37 Stat. 566-567). The Act authorized the Commission to decide whether actual or potential competition existed (Pet. App. 13a-14a). In addition, the Act contained a grandfather clause permitting railroads that already owned water carriers to continue to do so if the Commission determined that continued ownership was in the public interest and would not reduce water competition (*id.* at 14a). The court noted, however, that there is no indication in the language or history of the Act "that Congress focused on the question of *when*—before or after the acquisition—the ICC would determine the existence or absence of competition in the event a rail carrier proposed to buy a water carrier" (*ibid.*) (emphasis in original). In addition, the court pointed out that the statutory history sheds no light on the meaning of the term "interest" (*id.* at 15a).

The court of appeals then discussed the amendments to the Panama Canal Act that were enacted as

part of the Transportation Act of 1940, ch. 722, 54 Stat. 898 *et seq.* (Pet. App. 18a-20a). Vastly changed circumstances led to the new legislation: "the railroads were in poor financial shape and were beset by strong competition from unregulated water carriers" (*id.* at 18a). Congress, at the urging of the railroads, brought water carriers under Commission regulation. Most significantly, the Panama Canal Act was amended to permit railroads to acquire control of competing water carriers, with Commission approval following a hearing (*id.* at 18a-20a). The court observed that Congress again apparently did not focus on when the Commission would hold the hearing to consider whether competition existed and determine if the acquisition was in the public interest (*id.* at 20a).

The court of appeals next reviewed prior Commission decisions on railroad acquisitions of water carriers. Two cases involved purchase contracts contingent on Commission approval (Pet. App. 21a-22a). The court analyzed the "interest" acquired by the purchasing railroad in the contract and the "interest" acquired here by CSX through the independent, irrevocable voting trust, and found them comparable (*id.* at 25a-29a). The court noted that, in the purchase contract cases, the Commission had not found that the "interest" held by the railroad contravened the prohibition of Section 11321 against acquiring an interest prior to a hearing or Commission authorization.

The court of appeals concluded that the term "any interest whatsoever" could not be taken as literally as petitioner would read it (Pet. App. 25a). To do so, the court reasoned, would be contrary to Commission precedent in the purchase contract cases and

would frustrate the purpose of the 1940 amendment to the Panama Canal Act by practically foreclosing rail-water mergers (Pet. App. 25a-29a).[1]

c. The court of appeals lifted the stay effective 24 hours from the date of its decision. CSX then purchased a controlling interest in Texas Gas, and all the water carrier stock was deposited in the voting trust. CSX submitted an application for approval on November 4, 1983, and the Commission accepted the application for consideration on November 29, 1983 (App., *infra*, 1a-11a). In its decision accepting CSX's application, the Commission stated its intention "to complete the evidentiary record by May 30, 1984, and serve the final decision no later than 90 days thereafter" (*id.* at 4a).

## ARGUMENT

The decision of the court of appeals is correct and involves an issue of first impression that had never before been addressed by a court and may never recur. Accordingly, this case does not present a question of sufficient importance to warrant review by this Court.

Petitioner essentially relies on the arguments expressed by the dissenting judge in the court of appeals. These points were considered and dispositively answered in the majority opinion (see, *e.g.*, Pet. App. 23a n.25, 26a n.28, 28a n.31, 29a). Moreover, petitioner's contention (Pet. 22) that the court's decision, which merely permits a voting trust until final disposition of the Commission's proceeding on the merits

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[1] In dissent, District Judge Greene insisted on a literal reading of the statute, which would require a full hearing and Commission authorization prior to any purchase of stock (Pet. App. 37a-50a).

of the acquisition, is a decision "permitting the second largest railroad to acquire the largest inland water carrier," is patently incorrect.

1. Petitioner first contends (Pet. 11-12) that a literal interpretation of "any interest" must govern, thereby prohibiting the acquisition by a railroad of any right or claim in a water carrier until a hearing has been held and the Commission has ruled. As the court of appeals concluded, however, such an interpretation would frustrate the congressional purpose in enacting the 1940 amendment, which explicitly permits certain joint rail-water ownership. In rejecting an absolutely literal interpretation of the "interest" prohibition, the court correctly noted (Pet. App. 26a n.28) that the statute "cannot * * * realistically be implemented without prior acquisition of some 'interest.'" The court explained that it is necessary either to adopt a nonliteral interpretation of the term "interest" (by considering some interests as not prohibited), or to reject the notion that the statute requires prior approval of acquisitions. Otherwise, it would be impossible to give "meaning and effect to the permission provision" adopted in 1940 (*ibid.*).[2]

The court of appeals observed (Pet. App. 29a) that the Commission's interpretation

> is consistent with the dual purpose of the Canal Act to permit some rail-water mergers while preserving vigorous water competition and with the congressional policy, stated in the Staggers Act, "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10,101(a)(2).

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[2] The court pointed out (Pet. App. 26a n.28) that petitioner's claim must be denied under either theory.

The court properly deferred to the Commission's reasonable interpretation of the statute it is charged with administering and enforcing. See, *e.g.*, *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20; *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

The court below also found the literal interpretation of "interest" advocated by petitioner to be contrary to past Commission precedent, which permitted the holding by railroads of contractual interests in water carriers (Pet. App. 23a-29a). The court compared purchase contracts and voting trusts, and found that they both are "strictly limited in time duration and * * * insulate the water carrier from railroad control pending a full ICC hearing" (*id.* at 27a). The court pointed out that, under either arrangement, "the rail carrier lacks the control over the water carrier needed to embark on major anticompetitive actions such as predatory pricing" (*id.* at 28a) (footnote omitted). Indeed, the court observed (*ibid.*) that a water carrier controlled by an independent trustee would have greater ability to compete with the purchasing railroad than a water carrier subject to a purchase contract.

Here, as the court of appeals emphasized, CSX has only a short term stake in the water carrier's future profits because of the interim nature of the voting trust (Pet. App. 28a n.31).[3] The court properly concluded (*id.* at 28a n.32) that the water carrier's independence was assured by

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[3] **As noted above, the Commission has accepted CSX's application for filing, and a final Commission decision is anticipated no later than the end of August 1984. The voting trust provides for divestiture of the water carrier stock if the Commission disapproves of the transaction (Pet. App. 28a n.31).**

the ICC's voting trust guidelines (including advance ICC review of the trust agreement), the temporary nature of the voting trust, and ICC authority to remedy any attempted abuse of the trust.

2. Petitioner's attempts to buttress its argument with citations to prior Commission decisions were properly rejected by the court of appeals. First, petitioner's reliance (Pet. 12) on a passage from Chairman Eastman's concurring opinion in *Nicholson Universal S.S. Co. Ownership*, 248 I.C.C. 43, 67 (1941), is misplaced. As both the court (Pet. App. 23a n.25) and the Commission (*id.* at 57a-58a) pointed out, the majority of the Commission in *Nicholson* did not hold that a voting trust was a forbidden interest per se; rather, the majority found that impermissible control existed regardless of the voting trust. In his concurring opinion, Chairman Eastman was speaking for himself, not the Commission.

Petitioner also relies (Pet. 13) on *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935), as establishing an absolute prohibition of the acquisition of an interest by a railroad in a water carrier. As the court below noted (Pet. App. 17a), all that *Seatrain* established was that the holding of less than a majority of stock or less than a controlling interest could bring Section 11321 into play. The court further pointed out that, despite the railroads' existing minority interest in *Seatrain*, the Commission approved their continuing ownership interest in the water carrier as in the public interest. The court added (Pet. App. 18a):

> Significantly, the Commission did not suggest that it was improper for the railroads to acquire an interest in a competing water carrier first and ask the Commission's approval later.

Thus, even the cases relied upon by petitioner support the Commission's conclusion that the beneficial ownership of water carrier stock, held in an independent, irrevocable voting trust, does not violate Section 11321.

3. Petitioner's contention (Pet. 18) that the decision of the court of appeals will nullify a congressional prohibition of railroad acquisition of water carriers is based on petitioner's refusal to accept the changes that have occurred since the enactment of the Panama Canal Act of 1912. In the Transportation Act of 1940, Congress itself lifted its own prohibition of such acquisitions. Petitioner would have this court "nullify" the 1940 amendment to the Panama Canal Act authorizing rail-water mergers under appropriate conditions. But, as the court of appeals stated (Pet. App. 20a), "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." If petitioner's interpretation were accepted, however, it would be practically impossible to give "meaning and effect to the permission provision" in the 1940 amendment (*id.* at 26a n.28).

4. Petitioner concludes with an argument (Pet. 21-22) that would make sense only if the application and hearing proceeding before the Commission had already taken place. Petitioner refers to "this merger," and to "the transaction [that] has been permitted to proceed" (Pet. 22), and it takes the Commission to task for "permitt[ing] one of the nation's largest railroads to acquire the nation's largest inland water carrier" (Pet. 21). Petitioner simply disregards reality. Now that CSX's application has been accepted for filing by the Commission, the Commission will proceed to conduct a full hearing and then will rule on whether the acquisition is consistent with

the public interest and the Panama Canal Act. CSX is committed to divest itself of the water carrier stock if the merger is disapproved. Petitioner fails to explain how this procedure does not protect its interests as well as a pre-voting trust hearing would. The strictures of the Panama Canal Act will be respected in either case.

Petitioner also vastly exaggerates the problems it faces during the pendency of the Commission proceeding. To begin with, its estimate of "several years" for decision and appeals should be compared to the Commission's commitment that its final decision will be announced in August 1984. Petitioner complains of potential anticompetitive activity during the pendency of the proceeding. It repeats (Pet. 21-22) the Commission's statement (Pet. App. 63a-64a) that the voting trust agreement itself does not prevent anticompetitive action. Petitioner, however, fails to mention the Commission's discussion (*ibid.*) of the remedies available to prevent and punish any violations of the Interstate Commerce Act that might arise. As the court of appeals pointed out (*id.* at 10a) in this regard,

> if CSX were to attempt to influence barge operations notwithstanding the trust, the ICC could act at that time; an injunction was not needed to prevent "speculative future violations."

In short, petitioner will have ample opportunity at the "full hearing" before the Commission to show that its complaints of potential competitive harm from the CSX acquisition of the water carrier are more than speculation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

## APPENDIX

## INTERSTATE COMMERCE COMMISSION

### DECISION NO. 6

### Finance Docket No. 30300

### CSX CORPORATION—CONTROL—AMERICAN COMMERCIAL LINES, INC.

Decided: November 29, 1983

On November 4, 1983, CSX Corporation (CSX) and American Commercial Lines, Inc. (ACL) jointly filed an application under 49 U.S.C. 11321, 11343, and 11344 seeking authority for CSX to acquire control of ACL and its certificated water carrier subsidiary American Commercial Barge Lines, Inc. (ACBL). This application was filed under our consolidation regulations applicable to significant transactions, 49 CFR 1180, as modified by Decision No. 3, served October 19, 1983. On November 25, 1983, applicants filed their response to the supplemental information request contained in Decision No. 3. We are accepting the application and supplementary information for filing because they substantially comply with the applicable modified regulations and the requirements of Decision No. 3.

In their response to the supplemental information request, applicants state that full, exact responses to all data requests regarding traffic lanes and market shares are not possible because necessary information is not available either in applicants' records or in public sources. Therefore, applicants have provided information on traffic lanes and market shares based on

their best estimates derived from available data. In view of the data and economic market analysis contained in the application, we conclude that applicants' response to the supplemental information request is adequate. The application and response provide sufficient information to determine whether applicants have established a *prima facie* case. Therefore, the application, as supplemented, is complete and will be accepted for filing.

Pursuant to a tender offer, CSX acquired ACL's corporate parent, Texas Gas Resources Corporation (TGR). CSX and TGR placed ACL's stock in an independent voting trust pending a decision on the control application.[1] If the application is approved, the

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[1] In *Water Transport Association* v. *I.C.C., et al.*, No. 83-1737, United States Court of Appeals for the District of Columbia, decision filed August 4, 1983, the court affirmed our decision, in Finance Docket No. 30215, *Water Transport Association-Petition For Declaratory Order-American Commercial Lines Voting Trust* (not printed), served July 1, 1983, that CSX's ownership of ACL stock held in the voting trust did not violate 49 U.S.C. 11321. In Decision No. 2 in this proceeding, served September 1, 1983, CSX and ACL requested and were granted a protective order allowing CSX and ACL employees and consultants to exchange information during preparation of the control application and the pendency of this proceeding.

On September 20, 1983, the Water Transport Association (WTA) filed a petition to reopen and stay Decision No. 2. WTA argues that the Commission erred in not giving the public an opportunity to comment on the request for a protective order. It also argues that, even if no public comment was necessary, the protective order should have been denied on the grounds that the exchange of operating information between CSX and ACL could have serious anti-competitive effects by spreading confidential data throughout the two companies, thereby violating the trust agreement and section 11321. Finally, the WTA argues that any exchange of information

voting trust will be dissolved and CSX will acquire ACL as a direct subsidiary.

CSX, a non-carrier, is a holding company with rail carrier subsidiaries including the Chessie System railroads, Seaboard System Railroad, Inc., and the Richmond, Fredericksburg, and Potomac Railroad Company. CSX's railroad subsidiaries operate over a 27,000-mile system in 22 States in the East, South, and Midwest.

ACL, through its subsidiaries, is involved in all phases of inland waterway transportation. ACL operates on about 7,500 miles of the nation's inland waterways. These waterways include the Ohio, Illinois, Mississippi, Tennessee, Cumberland, Warrior, and Alabama Rivers and the Gulf Intracoastal Waterway between Florida and Brownsville, TX. Other

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should be stayed pending completion of all appellate proceedings challenging the legality of the voting trust agreement and CSX's acquisition of ACL.

WTA's petition is denied. The purpose of the protective order was to facilitate preparation of the application by determining at the outset how information could be exchanged by CSX and ACL without violating section 11321. Since there was no adjudicatory proceeding at that stage of this proceeding, interested parties did not have a right to comment on the protective order. We conclude that the protective conditions are sufficient to prevent violations of the voting trust agreement or the use of information for anti-competitive purposes. The protective conditions strictly limit employee access to information and what use may be made of it. Further, contact between ACL and CSX personnel was necessary for the timely preparation of the control application. It would have been unreasonable, inefficient and a waste of both the Commission's and the parties' resources to require ACL and CSX to develop and submit their evidence separately. Finally, we will not stay this proceeding on the basis of the WTA's on-going court proceeding.

ACL subsidiaries conduct boat manufacturing and repair businesses and operate riverside terminals.

If the application is approved, CSX will operate its railroad subsidiaries and ACL as a single transportation system performing integrated rail and barge operations. CSX does not plan to abandon any railroad lines as part of the proposed transaction.

The Commission's Section of Energy and Environment has reviewed applicants' Environmental Report and found it to be complete. Information contained in that report suggests that there is no environmental significance in applicants' proposed action. While information yet to be submitted may cause the Section to change its position, it is now anticipated that the environmental consequences of this proposed consolidation will be explained in an Environmental Assessment.

The application and exhibits are available for inspection in the Public Docket Room (Room No. 1221) at the offices of the Interstate Commerce Commission in Washington, D.C.

This proceeding is subject to the statutory time limits set forth in 49 U.S.C. 11345(c) and will be handled under our regulations applicable to significant consolidations set forth in 49 CFR Part 1180, as modified. Accordingly, we intend to complete the evidentiary record by May 30, 1984, and serve the final decision no later than 90 days thereafter.

Any interested person may participate in this proceeding by submitting written comments regarding the application. Comments must be filed no later than January 3, 1984. An original and 20 copies must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423. Written comments shall be concurrently served by first-class mail on the

United States Secretary of Transportation, the Attorney General of the United States, the United States Secretary of Energy, and applicants' representatives:

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Written comments must also be served upon all parties of record within 10 days of issuance of the service list by the Commission. We plan to issue the service list by January 27, 1984.[2] Any person who files

[2] Issuance of the service list will be within 55 days of the application's acceptance, in accordance with the regulations applicable to major transactions. 49 C.F.R. 1180.4(a)(4). Comments by public parties are not due until 45 days after acceptance of the application. 49 C.F.R. 1180.4(d)(2). Therefore, issuance of a service list within 45 days of acceptance is not possible.

timely written comments shall be considered a party of record if the person's comments so request. In this event no petition for leave to intervene need be filed.

Written comments must contain [49 CFR 1180.4 (d)(1)(iii)]:

(1) the docket number and title of this proceeding;

(2) the name, address, and telephone number of the commenting party and its representative upon whom service shall be made;

(3) the commenting party's position, whether in support of or in opposition to the proposed transaction;

(4) a statement of whether the commenting party intends to participate formally in the proceeding or merely comment upon the proposal;

(5) a list of all information sought to be discovered from applicant carriers;

(6) an initial list of specific protective conditions sought; and

(7) an analysis of the issues the Commission must consider in this proceeding under the applicable statutes and the policies of the antitrust laws.

Because we have determined that the proposal in this proceeding constitutes a significant transaction, railroads and other carriers filing written comments must, in addition to the above information, submit a statement of whether the commenting carrier intends to file inconsistent applications, petitions for inclusion, or trackage rights applications or intends to seek any other affirmative relief requiring the filing of an application with the Commission. *This will be con-*

*sidered a prefiling notice without which the Commission will not entertain applications for this type of relief.* We are waiving on our own motion the requirements found in our regulations [49 CFR 1180.4 (d)(l)(iii)(I)(1) and (2)] that railroads filing written comments include with their comments copies of existing preferential solicitation agreements and a list of run-through train operations. Commenting railroads and other carriers will have incentives to file such information voluntarily where relevant. We do not seek this information, however, to the extent it is not relevant to the issues in this rail-water carrier proceeding.

Preliminary comments from the Secretary of Transportation, Attorney General, and Secretary of Energy must be sent to the Commission by January 18, 1984.

Parties may modify any of their requested specific protective conditions by filing a second list of protective conditions no later than January 31, 1984. Parties shall not be permitted to seek any protective conditions other than those requested in either their first or second list of protective conditions.

Parties filing responsive applications must do so no later than January 31, 1984. Responsive applications include inconsistent applications, petitions for inclusion, and any other affirmative relief that requires an application to be filed with the Commission (including trackage rights; purchase, acquisition, construction, or operation of a railroad line; pooling or terminal operations; or abandonment of a railroad line). Any responsive applications which are not major are presumed to be significant. Responsive applications must include all supporting evidence in the form of verified statements.

All evidence in opposition to the primary application, in the form of verified statements, is due January 31, 1984. Opposition evidence shall be served on all parties of record and shall be filed (with 20 copies) with the Commission.

All parties representing public bodies, including the Secretary of Transportation, the Secretary of Energy, and the Attorney General, must submit their evidence, in the form of verified statements, supporting their positions no later than March 2, 1984.

Primary and responsive applicants may file evidence in rebuttal to any opposition evidence (including opposing evidence submitted by interveners). Rebuttal evidence shall be due March 28, 1984, and must be served on all parties of record and filed (with 20 copies) with the Commission.

Any impact analyses, traffic studies, and data submitted shall relate to the calendar year January 1, 1981 to December 31, 1981. These data may be supplemented with data from more recent years where available and relevant.

Parties intending to file responsive applications shall file any petitions for waiver, clarification, extension of time, or petitions seeking to rebut the presumption of significant transaction, relating to the responsive applications, with their comments on the primary application. These petitions shall be filed no later than January 3, 1984. Each responsive application filed and accepted (if required) is considered consolidated with the primary application in this proceeding.

CSX and ACL are directed to respond by January 20, 1984, to any information requests contained in the written comments of other parties. Their responses should indicate what information will be voluntarily

supplied and the reasons why the remainder of the information will not be voluntarily supplied. Because of the statutory deadline applicable to this proceeding, we advise all parties to respond to discovery requests promptly. We will not tolerate dilatory tactics or excessive and abusive use of discovery procedures. A refusal to supply information voluntarily will be treated as an objection to discovery. Responses to discovery requests shall be served on all parties of record and 20 copies of these responses shall be concurrently filed with the Commission.

The original and 20 copies of all documents in this proceeding shall be filed with the Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, D.C. 20423.

We will hold oral hearings in this proceeding for the purpose of cross-examination of witnesses submitting verified statements. Hearings will be conducted in four phases. Phase I will relate to applicants' case-in-chief. Phase II will include protestants' evidence in opposition to the primary application and evidence in support of responsive applications. Phase III will embrace the evidence submitted by intervening public parties, including the Secretary of Transportation, the Secretary of Energy, and the Attorney General, and opposition to responsive applications. Phase IV will relate to rebuttal evidence. Hearings will begin on February 7, 1984 and conclude on April 12, 1984.[3]

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[3] Tentatively, Phase I will run from February 7 through 22, 1984. Phase II will run from February 27 through March 13, 1984, Phase III will run from March 19 through 23, 1984, and Phase IV will run from April 2 through 12, 1984. These dates (except for the beginning of Phase I and concluding of Phase of Phase IV) shall be subject to adjustment by the presiding Administrative Law Judge. The Chief Administrative Law

Chief Administrative Law Judge David Allard will conduct the evidentiary proceedings. Within the discretion of Judge Allard, prehearing conferences may be held. If a prehearing conference is to be held, Judge Allard will issue a decision advising the parties of the time and place.

Any interlocutory appeals from rulings by the Judge will be considered by the entire Commission. Interlocutory appeals must be filed within 5 days after the date on which the ruling appealed from was made. Replies must be filed within 3 days after the appeal is filed. Interlocutory appeals must satisfy the requirements of 49 CFR 1113.15.

Post-hearing opening briefs by the parties shall be due on May 11, 1983. Reply briefs shall be due May 30, 1983. If oral argument before the Commission is held, it will take place in late June or early July.

By statute, the evidentiary phase of the proceeding must be concluded by May 30, 1984. The initial decision will be waived and the determination of the merits of the application will be made in the first instance by the entire Commission under 49 U.S.C. 11345.

This decision will not significantly affect either the quality of the human environment or the consumption of energy resources.

*It is ordered*:

1. The application, as supplemented on November 25, 1983, in Finance Docket No. 30300 is accepted for consideration.

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**Judge shall have authority to order bifurcation of the hearings if necessary to conclude the evidentiary hearings in a timely manner.**

2. The parties shall comply with all provisions as stated above.

3. The WTA petition to reopen and stay is denied.

4. This decision shall be effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

JAMES H. BAYNE
Acting Secretary

[SEAL]

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